

PROCEDURES RELATING TO THE CREDIT COUNSELING REQUIREMENTS OF § 109(h)

Statutory Background

New § 109(h) requires that individual debtors obtain a credit counseling briefing within the 180 days prior to filing for bankruptcy relief. This briefing, with limited exceptions, is a prerequisite to an individual debtor's eligibility to file the bankruptcy case. Hence, in the overwhelming majority of cases, a certificate from the counseling provider reflecting that the debtor has undergone the required counseling should be filed initially with the petition itself.

In some instances, the debtor may have undergone the credit counseling briefing prior to filing the bankruptcy case as required, but not yet have the counselor's certification verifying that fact. Rule 1007 of the *Interim Rules of Bankruptcy Procedure* was recently amended to address this issue. Under the amended Rule, a debtor, who has undergone a pre-bankruptcy counseling briefing but does not have the counselor's certificate, is given an additional 15 days to file the counselor's certificate reflecting that a briefing was conducted pre-bankruptcy.

There are two limited exceptions to the general rule that individual debtors undergo a credit counseling briefing before being eligible for bankruptcy relief. First, a debtor may merit a 30-day exemption from the pre-bankruptcy briefing requirement by filing a certificate showing 1) exigent circumstances and 2) that a briefing was requested but could not be provided within 5 days of the request. See § 109(h)(3). Second, the credit counseling briefing requirement is waived altogether for those individuals who are on active military duty in a combat zone or who suffer from a mental incapacity or physical disability to the requisite extent. See § 109(h)(4).

Prior Procedure

Approved credit counselors were not named in this district until the very eve of the effective date of § 109(h). With this in mind, the court advised the clerk not to dismiss any individual's case for want of the pre-bankruptcy credit briefing certificate, but rather, to provide the debtor with a deficiency notice. The notice advised the debtor that the certificate must

be filed within 48 hours on threat of dismissal of the case.

Unfortunately, it has come to the court's attention that some have mistakenly construed the clerk's deficiency notice as effectively extending the time for a debtor to comply with the credit counseling requirements of 109(h) to 48-hours post-bankruptcy. Such a construction was never this court's intent nor, more importantly, is it in keeping with the statute.

New Procedure

In the future and effective immediately, the clerk, while continuing to provide deficiency notices, will eliminate in the notices any reference to a deadline by which the certificate must be filed. Hopefully, by eliminating the reference to a deadline, any implication that the time to comply with § 109(h) has been extended will be eliminated.

Although filing the credit counseling certificate is the duty of the debtor under § 521(b), failure to do so does not result in the automatic dismissal of the case as is the case when the debtor fails to timely perform certain other duties. See § 521(l). Therefore, neither the court nor the clerk will act, *sua sponte*, to dismiss a case for noncompliance with the provisions of § 109(h). Rather, the court will act only on motion by a party-in-interest seeking dismissal of the case for want of the debtor's eligibility.

Conclusion

Unquestionably, through § 109(h), Congress intended to foster a public policy of resolving individual debtors' financial problems through credit counseling plans instead of bankruptcy. Yet, § 109(h) can certainly be a trap for the unwary debtor or debtor's attorney. Absent the exigent circumstance exemption of § 109(h)(3) or the complete waiver situations under § 109(h)(4), an individual must have completed a credit counseling briefing prior to filing for bankruptcy relief. Failure to do so may result in the dismissal of the case on motion of a party-in-interest.

December 5, 2006.

Dwight H. Williams, Jr.
United States Bankruptcy Judge